BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDY D. ELLIS Claimant	)	
VS.	)	Docket No. **1,050,718**
CITY OF OVERLAND PARK Self-Insured Respondent	)	

ORDER

Claimant requests review of the May 4, 2012 Award entered by Special Administrative Law Judge (SALJ) Gregory A. Lee. The Board heard oral argument on August 22, 2012.

APPEARANCES

Kevin J. Kruse of Overland Park, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent, a qualified self-insured employer.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award. Both counsel agreed at oral argument that the Board should, if necessary, decide the issues found to be moot by the SALJ, specifically whether notice was provided to respondent in a timely manner and whether claimant is entitled to future and unauthorized medical compensation.

ISSUES

The SALJ found claimant failed to prove that he was injured by a series of repetitive traumas arising out of and in the course of his employment with respondent. The SALJ deemed all other issues moot and accordingly those issues were not addressed.

Claimant requests review of the following: (1) whether claimant sustained personal injury by a series of repetitive traumas which arose out of and in the course of his employment; and, (2) the nature and extent of his disability.

Respondent argues the SALJ's Award should be affirmed.

The issues for the Board to consider are:

(1) Did claimant sustain personal injury by a series of repetitive traumas which arose out of and in the course of his employment?

(2) Did respondent receive timely notice?

(3) What is the nature and extent of claimant's disability?

(4) Is claimant entitled to future and unauthorized medical compensation?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Randy Ellis was age 46 when he testified at the November 22, 2011 regular hearing. He had been continuously employed by respondent since January 1988. Claimant's work required him to write and maintain computer applications for respondent as well as support some applications for the police department and the parks and recreation department. Over the years, claimant performed a number of jobs for respondent, including programmer analyst I, programmer analyst II, and senior programmer analyst. All of the jobs claimant performed required sitting at a desk doing computer work. Claimant's work station consisted of a U-shaped desk with three computers, two monitors, a chair, a keyboard, a mouse tray, and a mouse. Claimant was required to sit at his work station seven plus hours a day, five days a week, and when working overtime.

In approximately 1995, claimant developed complaints of muscle tightening and knotting around his right shoulder and neck. Those symptoms caused claimant to seek assistance from a massage therapist. Claimant's visits to the masseuse rapidly increased to once every four weeks. Claimant continued to receive monthly massage therapy through the date of his regular hearing testimony. Claimant testified that the extent of the pain relief he received from the massage therapy was currently less than in prior years.

In his application for hearing, claimant alleged repetitive injuries from February 1, 2010 "through present."[1] The ALJ who presided at the regular hearing stated that "claimant is claiming injury to his cervical spine and upper back and bilateral shoulders as a result

[1] Application for hearing filed on May 13, 2010; Application for preliminary hearing filed on May 26, 2010.

of a repetitive series of injuries to March 8, 2010, ..."[2] Neither counsel disagreed with the ALJ.

Claimant attributed his injuries to his positioning at his work station using his computer. Claimant testified:

> Q. Over the years, have your complaints gradually worsened up through the present?
>
> A. Yes.
>
> Q. And how have they worsened?
>
> A. The pain intensity has increased.[3]

In late January or early February 2010, claimant's complaints worsened. He experienced increased shoulder, upper back, and neck pain. Claimant also developed other symptoms, including chest pain, headaches, and abdominal pain. Claimant initially attributed worsening of his symptoms to stress resulting from claimant's concern he might lose his job due to impending staff reductions. He completed an injury report on February 3, 2010, in which claimant indicated that stress was causing an increase in his symptoms. Claimant advised Ms. Vicki Irey, his department director, and Angelo Phillips, respondent's safety person, about his pain complaints. Once claimant's stress decreased his headaches, chest pain, and stomach tightness resolved.[4]

Respondent hired a physical therapist from Overland Park Regional Medical Center who performed an ergonomic assessment of claimant's work station on February 8, 2010.[5] As a result of the ergonomic assessment, respondent made changes to claimant's work station, including adjusting the height of the computer monitors and providing claimant with a new chair. Claimant testified he received no significant benefit from the modifications to

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[2] R.H. Trans. at 3.

[3] *Id.* at 9.

[4] Claimant survived the staff reductions which occurred on January 28, 2010.

[5] R.H. Trans. at 15-16. Claimant offered the written ergonomic study into evidence over respondent's objection. The SALJ did not rule on respondent's objection. The basis for respondent's objection was K.S.A. 44-519. However, that provision does not apply because it only limits the admissibility of reports prepared by a "health care provider," which, pursuant to K.S.A. 2009 Supp. 44-508(i), does not include physical therapists. To the extent that the ergonomic study sets forth facts material to the issues in this claim, it is admissible as evidence. Respondent's objections to the ergonomic study go to the weight to which the document should be provided, not its admissibility.

his work station. However, claimant apparently told Dr. Hanson that the work station modifications improved his symptoms.[6]

In February 2010, claimant sought treatment from his family physician, Dr. Shari Berl. Dr. Berl initiated conservative treatment and thereafter provided claimant with a letter dated March 8, 2010. Claimant understood the letter to state that he was injured due to his positioning at his work station.[7] Claimant gave the letter to Mr. Phillips on March 9, 2010. Claimant completed another injury report on March 11, 2010, indicating that his upper back, neck and shoulder problems were related to his work. Respondent denied the compensability of the previous "stress claim," however, claimant was provided with authorized treatment for the second claim.

On March 23, 2010, respondent sent claimant to Corporate Care where he was seen by Dr. Robert Brown. Dr. Brown diagnosed neck/thoracic strain and prescribed conservative treatment. Claimant was again seen by Dr. Brown on March 29, 2010. Dr. Brown told claimant to remain at regular duty work except to alternate sitting and standing as needed for comfort.[8] Claimant was thereafter seen by two additional physicians at Corporate Care, following which a referral to a physiatrist was recommended.

Claimant was first seen by Dr. James Zarr, a specialist in physical medicine and rehabilitation, on August 4, 2010. Dr. Zarr's diagnostic impression was persistent neck and upper back pain. He recommended medication, trigger point injections, as well as cervical and thoracic MRI scans. Claimant received a series of three trigger point injections by Dr. Daniel Bruning. A thoracic MRI scan was within normal limits. The cervical MRI scan performed on August 5, 2010, revealed mild to moderate central stenosis due to disc bulging and posterior spur formation; very slight compression of the ventral surface of the spinal cord, with no evidence of cord edema or myelomalacia; and foraminal stenosis on the right at C5-6 and on the left at C6-7 due to uncovertebral osteophytes.

Dr. Zarr saw claimant for the second and final time on September 1, 2010, at which time Dr. Zarr found claimant had achieved maximum medical improvement (MMI). Dr. Zarr rated claimant's permanent functional impairment per the AMA *Guides*[9] at 5% to the whole body. In a letter dated November 2, 2010, Dr. Zarr expressed the following opinion

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[6] Hanson Depo. at 33-34.

[7] The parties dispute the admissibility of Dr. Berl's March 8, 2010 letter, which was offered into evidence by claimant over respondent's objection. The SALJ did not rule on respondent's objection. The letter itself is not admissible in the absence of Dr. Berl's sworn testimony, pursuant to K.S.A. 44-519. The Board accordingly has not considered the contents of the letter itself.

[8] P.H. Trans. at 30; Zarr Depo., Resp. Ex. B at 2.

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

regarding causation: "It is my medical opinion with reasonable medical certainty that the persistent neck and upper back pain complaints of Randy Ellis are due to pre-existing conditions and not due to any work related event."[10]

However, Dr. Zarr testified:

> Q. Doctor, you would agree with me that if one's working in their workstation and they have to have an awkward neck posture, especially for several consecutive hours in a day, that that can cause associated pain or complaints, correct?
>
> A. Correct
>
> Q. You would also agree with me that if one has to work where they're at rounded shoulder posture with a forward arm position, again, especially for several consecutive hours a day as Mr. Ellis did in his employment, that again, this can cause associated pain or complaints.
>
> A. Correct.[11]

Dr. Zarr testified that claimant's increase in symptoms in February 2010 regarding his back, neck and trapezius area was stress induced.

At the request of claimant's attorney, Dr. Ernest Hanson, a board certified neurosurgeon, evaluated claimant on October 26, 2010, and January 11, 2011. The doctor took a history, reviewed medical records, and performed a physical examination. Dr. Hanson diagnosed cervical spondylosis with involvement at C5-6 and C6-7. Dr. Hanson testified that claimant's "condition was aggravated or progressed by the work-related activities involving ongoing sitting hour after hour at a desk and looking at a computer screen with his head held in a rigid position in space."[12] The doctor elaborated:

> Inherent to the work description provided by Mr. Ellis when I talked to him was that he literally would spend eight hours a day sitting at this workstation looking at this computer screen, programming and manipulating data and entering data, and that was what he did every day, day in and day out. He said that as his day would go on at work, his symptoms would get progressively worse. In the evening and on weekends when he wasn't required to be in that position his symptoms would generally diminish.[13]

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[10] Zarr Depo., Resp. Ex. D.

[11] *Id*. at 20-21.

[12] Hanson Depo. at 14.

[13] *Id.* at 16.

In his narrative report dated January 24, 2011, Dr. Hanson opined:

> It is recognized that cervical spondylosis is generally felt to be part of the degenerative process that develops to a lesser or greater extent in most adults as they age. While this is true, Mr. Ellis is currently only 45 years of age, the extent and progression of his symptoms and the pathologic changes present on his cervical MRI study demonstrate a degenerative process which is clearly excessive for his age group. Consequently, I would consider the prolonged sitting with fairly rigid fixation of the upper body necessary in order to operate and program computer equipment as contributory to the causation, progression and aggravation of his current medical situation.[14]

Based on the AMA *Guides*, Dr. Hanson found claimant sustained a 7.5% whole person impairment.

Dr. Hanson testified that cervical x-rays taken in June 1994 revealed no abnormality, whereas the MRI of August 5, 2010, revealed structural change in claimant's cervical spine. The doctor opined that claimant's ongoing positional requirements of his job aggravated or accelerated his underlying cervical spondylosis.

Claimant told Dr. Hanson that "he feels that his current neck and shoulder symptoms have returned to baseline and are no longer aggravated to the extent they had been by his work-related activities" and that he "has been allowed go [sic] get up as needed and walk around, and this also seems to help relieve his symptoms."[15] Dr. Hanson testified that when he used the term "baseline" he meant the condition of claimant's back before the increase in his symptoms in January and February 2010.[16]

In July 2009, claimant began seeing a chiropractor, Dr. Brad Willits, for neck pain. Although claimant testified his symptoms improved from the chiropractic manipulations, he continued to receive adjustments and massage therapy from Dr. Willits or his staff into January 2010.

At the time of the regular hearing, claimant continued to experience pain in his upper back, right shoulder blade and up into his neck.

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[14] *Id.*, Cl. Ex. 2 at 7.

[15] *Id.*, Cl. Ex. 2 at 5.

[16] *Id.* at 35.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[17] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[18]

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[19]

K.S.A. 2009 Supp. 44-508(d) and (e) state:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense

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[17] K.S.A. 2009 Supp. 44-501(a).

[18] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[19] *Id.* at 278.

of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. And injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-510e(a) states in relevant part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

> covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[20] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[21]

ANALYSIS

The Board finds that the SALJ's Award should be reversed. The preponderance of the credible evidence supports claimant's allegations that he sustained personal injury to his neck, shoulders, and upper back by a series of repetitive traumas arising out of and in the course of his employment with respondent. Claimant's testimony that his back and shoulder symptoms worsened in the years leading up to 2010 as he continued to perform his work for respondent is unrefuted. Claimant's testimony is uncontradicted that although the frequency of his visits to the massage therapist (once per month) remained the same, the effectiveness of the treatments decreased over time. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.[22]

Moreover, the worsening of claimant's injuries was documented objectively by comparing claimant's 1994 cervical films with the 2010 MRI. According to Dr. Hanson, the 1994 study revealed no abnormality, whereas the 2010 scan revealed the development of spondylosis. In Dr. Hanson's opinion, "the chronic ongoing positional requirements of [claimant's] job aggravated or accelerated his underlying condition."[23] There is no dispute that this claim is governed by the Old Act and, accordingly, if the alleged series of repetitive traumas serves to only aggravate, accelerate, or contribute to the injury then the claim is compensable.[24]

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[20] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[21] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[22] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[23] Hanson Depo. at 48.

[24] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

Claimant attributed his increase in symptoms to the positioning and work required that he performed for respondent. Claimant's testimony is supported by the report and testimony of Dr. Hanson. The evidence does indicate that claimant was experiencing stress due to his concerns about layoffs at or near the time of his increase in symptoms and that the stress likely contributed to the spike in claimant's complaints. However, the record does not support the notion that claimant's increase in neck, upper back and shoulder pain was solely the result of claimant's fear of a possible layoff.

The Board is not persuaded that Dr. Zarr's opinions are entitled to significant weight. Dr. Zarr opines that the increase in claimant's symptoms was stress induced. However, Dr. Zarr also expresses the opinion that claimant's persistent neck and upper back pain are due to preexisting conditions and not due to any work related event. Presumably, Dr. Zarr was referring to claimant's spondylosis when he said "preexisting conditions," but he does not explain how or why stress caused claimant to develop spinal abnormalities which were absent in 1994 but present in 2010, a period of time in which claimant was continuously performing computer work while employed by respondent. Dr. Zarr does not explain how claimant's symptoms gradually worsened in the 15-year period before 2010 or if those symptoms were caused by stress. Dr. Zarr's opinion that claimant's persistent neck and shoulder symptoms were not due to "any work related event" is mystifying when no specific work related event has been alleged in this claim. Dr. Zarr had no opinion on what caused claimant's pain in the 15-year period prior to 2010.[25]

Respondent highlights Dr. Hanson's testimony that claimant had returned to "baseline," by which the doctor meant claimant's condition before the increase in symptoms he experienced in January and February 2010. However, Dr. Hanson's testimony does not support the conclusion that the increase in claimant's complaints were merely temporary. Once again, the Board cannot ignore the evidence that claimant's work and its physical requirements resulted in a gradual worsening of his condition in the years leading up to 2010.

The other issues require little discussion. Pursuant to K.S.A. 2009 Supp. 44-508(d), the date of claimant's series of repetitive traumas was March 29, 2010, when the authorized physician, Dr. Robert Brown of Corporate Care placed claimant on the temporary work restriction to alternate sitting and standing as needed for comfort. Claimant provided respondent with notice before March 29, 2010, certainly no later than March 11, 2010, when claimant completed an injury form which caused respondent to authorize medical treatment. Respondent was provided with timely notice.

The parties stipulated that claimant is not entitled to permanent partial disability (PPD) exceeding his permanent functional impairment. The ratings in this claim are Dr. Zarr's 5% to the whole body and Dr. Hanson's 7.5% to the whole body. The Board is

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[25] Zarr Depo. at 37-38.

persuaded that as a result of the series of repetitive traumas in this claim, claimant sustained permanent impairment of function of 6% to the whole body and is entitled to PPD based on that impairment.

Claimant is entitled to future medical compensation upon application to and approval by the Director. Claimant is entitled to unauthorized medical compensation up to a total of $500 to the extent that unauthorized medical has not already been paid.

CONCLUSIONS OF LAW

(1) Claimant sustained personal injury to his shoulders, neck and upper back by a series of repetitive traumas which arose out of and in the course of his employment with respondent. The date of accident is March 29, 2010.

(2) Respondent was provided with timely notice.

(3) Claimant sustained a 6% permanent impairment of function to the whole body and is entitled to PPD based on such impairment as specifically set forth below.

(4) Claimant is entitled to future medical compensation upon application to and approval by the Director. Claimant is entitled to unauthorized medical compensation up to a total of $500 to the extent that unauthorized medical has not already been paid.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of SALJ Gregory A. Lee dated May 4, 2012, is hereby reversed.

Claimant is entitled to 24.90 weeks of PPD compensation at the rate of $546 per week or $13,595.40 for a 6% functional disability which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[26] K.S.A. 2009 Supp. 44-555c(k).

Dated this _____ day of December, 2012.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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